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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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# No. 917

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GUSTAFUS V. IVERSEN, ET AL.,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

Appellees' motion to affirm, though concluding with the familiar phrase "no substantial question", is in reality a brief on the merits of the question presented on this appeal. Tempting as is the opportunity seemingly afforded them to reply in kind, appellants will address themselves to the substantiality [1] rather than to the merits of the question presented.

[1] Summarily stated, in the light of the decisions of this Court on the issue of the existence of a substantial question, the proper inquiry "is not whether the question relied upon will be found, upon an examination of the merits, to be unsound". *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36, 30 S. Ct. 676, 679. It turns rather upon whether the claim has at least "color" of merit, *New Orleans Water Works* v. *Louisiana*, 185 U. S.

Tersely stated, the question here presented is whether the Interstate Commerce Commission on its own initiative may issue, without affording to interested persons an opportunity to be heard in any manner before such orders become effective, orders temporarily—

1. reducing the free time, as provided in lawfully published tariffs of common carriers by railroad, for the loading and unloading of carload shipments of perishables in refrigerator cars;

2. increasing the demurrage charges,[2] also provided in such tariffs, for the use of refrigerator cars pending loading or unloading thereof; and

3. changing the measure of the through rates, likewise provided in such tariffs, applicable on carload shipments of perishables in refrigerator cars held at points intermediate between the primary origin and ultimate destination for diversion or reconsignment.

Appellants contend that such orders change or determine and prescribe "rates, fares, or charges" within the meaning of Section 6, paragraph 3, and Section 15, *inter alia*, of the

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336, 22 S. Ct. 291; is "manifestly lacking all color of merit", *Wabash Railroad Co.* v. *Alexander Flannigan*, 192 U. S. 29, 24 S. Ct. 224, 226; is "so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous", *Seaboard Air Line Railway* v. *Clara V. Padgett*, 236 U. S. 668, 35 S. Ct. 481, 482; is "utterly without merit", *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway Co.*, 228 U. S. 596, 33 S. Ct. 605, 606-607; or is "more formal than substantial", *Equitable Life Assurance Soc.* v. *Brown*, 187 U. S. 308, 314, 28 S. Ct. 80. The question presented has been held to be substantial where "analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions" upon the issue currently presented, *Louisville & N. R. Co.* v. *Melton, supra;* or where the question "has not been the subject of express consideration" in prior decisions of the Court and hence "cannot be said to have been so explicitly foreclosed to cause the contention on the subject to be obviously frivolous", *Griffith* v. *Connecticut*, 218 U. S. 563, 31 S. Ct. 132, 134; *Louisville & N. R. Co.* v. *Melton, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Railway Co., supra.*

Interstate Commerce Act, and that the Commission has been empowered to make and enter such orders only in accordance with the notice or hearing procedure specified in those sections of the statute. Appellees contend that such orders suspend "rules, regulations, and practices • • • with respect to car service" and make "directions with respect to car service" within the meaning of Section 1 paragraph 15, of the Act, and that the summary manner in which such orders were promulgated and put into effect is countenanced by that and no other statutory provision. Respecting Section 1, paragraph 15, appellants assert (1) that that provision neither expressly nor by implication empowers the Commission to determine or prescribe or to change demurrage or other transportation rates or charges, and (2) that, if Section 1, paragraph 15, is to be construed to so empower the Commission, it is unconstitutional in that it authorizes an administrative agency to fix rates or

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[2] A quick grasp of the drastic increases in the charges which shippers and receivers of perishables are required to pay to the railroads as a result of the Commission's orders may be obtained from the following comparative table:

| *Normal Charges Established by Railroads* | *Charges Required by Fourth Revised Service Order 180 and Service Order 394* |
|---|---|
| Cars unloaded within 48 hours, exclusive of Sundays and bank holidays, after the first seven A. M. (7:00 A. M.) following arrival of the car at destination—no charge. | Cars unloading within 48 hours, including Sundays and holidays, after the first seven A. M. (7 A. M.) following arrival of the car at destination—no charge. |
| For the first two days or fraction of a day that a car is held after expiration of the free time—$2.00 per car per day. | For the first day after the expiration of the free time—$11.00 per car per day. |
| For the third day and each day or fraction of a day thereafter, after the expiration of the free time—$5.50 per car per day. | For the second day after the expiration of the free time—$22.00 per car per day. |
| | For the third day and all successive days or fraction thereof after the expiration of the free time—$44.00 per car per day. |

charges without affording interested persons an opportunity to be heard before the rate-order becomes effective.

Each of appellants' alternative contentions, the one statutory and the other constitutional, presents a substantial question.

## I

### The Scope of the Commission's Emergency Powers under Section 1, Paragraph 15, Is Uncertain

Paragraphs 10-17, inclusive, of Section 1 of the Interstate Commerce Act has their origin in the so-called Esch Car Service Act of May 29, 1917, c. 23, 40 Stat. 101. Undoubtedly, those provisions were intended to confer broad powers upon and to facilitate flexible action by the Commission in the field of "car service". The boundaries of that field, although dim, are neither limitless nor undiscoverable. This Court had no difficulty in finding the Commission was inside those boundaries in *Avent* v. *U. S.*, 265 U. S. 172; or in finding that the Commission had strayed beyond them in *Peoria & P. Union R. Co.* v. *U. S.*, 263 U. S. 528. In the latter case, the Court set aside a Commission order, issued under the purported authority of Section 1, paragraph 15, which directed one carrier to perform switching services for another. The Court said, at pp. 534-535:

> The Transportation Act of 1930 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end, and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication.

For at least twenty-five years after it received the emergency authority under Section 1, paragraph 15, the Commission did not even undertake to exercise it in connection

with the rates or charges to be paid by shippers or other members of the public enjoying railroad services. The motion to affirm recites appellees' version of the legislative history of Section 1, paragraph 15, and the other so-called "car service provisions" of the Act. Appellants, if permitted to submit brief and argument before this Court, will show that the legislative history demonstrably refutes any contention that these provisions were intended to countenance any such rate making or charge fixing activities.

Even at this late date, appellees admit they have not staked out the boundaries of the Commission's powers under Section 1, paragraph 15. Counsel for the Commission frankly stated in the course of argument in the court below:

> "• • • the full power of the Commission under these emergency provisions has never been defined, and I don't know whether it includes a line-haul rate or not" (Tr. p. 65).

The Commission's position in this case is that, whatever the authority of the Commission under paragraph 15 of Section 1 to change or prescribe line-haul rates, the Commission may fix or change demurrage charges on the theory that the latter are not altogether charges for transportation services but are, at least in part, penalties assessed against shippers or receivers for undue detention of cars. The court below, agreeing with the Commission's contention, glossed over the effect of Service Order No. 396 which, whatever the soundness of a claimed differentiation in kind between demurrage rates or charges and line-haul rates, definitely pertains to the latter.

The necessary effect of the judgment of the court below, if this Court should conclude that "no substantial question" is raised in this appeal, will be to subject to doubt and uncertainty the entire procedural structure of the Interstate Commerce Act. The court below evidently deemed it was

avoiding any such result by singling out for comment the Service Orders dealing exclusively with demurrage charges and passing lightly over the type of rates or charges—aggregate local versus through rates—affected by Service Order No. 396 and, further, by concluding that demurrage charges are not "rates as that term is used in connection with rate-making". Admittedly, demurrage charges have a somewhat different purpose than some of the other types of "rates, fares, or charges" comprehended by the Interstate Commerce Act, but, at least until publication of the opinion of the court below, it appeared to be well established that demurrage charges are "rates, fares, or charges" within the meaning of the Act and could be determined and prescribed by the Commission only in accordance with the hearing procedure specified by the Act to accompany the determination and prescription of "rates, fares, or charges" generally.

Indeed, this conclusion of the court below, to which, *inter alia*, appellants' assignment of errors is directed, presents a "substantial question" in and of itself. While it may appear to have a subsidiary aspect herein in that the determination of this question is a principal starting-point toward the determination of the scope of Section 1, paragraph 15, it has an independent and substantial significance of its own. The opinion of the lower court in this connection is squarely at variance with the conclusions reached in *Turner, Dennis & Lowry Lumber Company* v. *Chicago M. & St. P. Ry. Co.*, 271 U. S. 259, 262, 46 S. Ct. 530, 531; *Lehigh Valley R. Co.* v. *U. S.* (Pa. 1911), 188 F. 879, 110 C. C. A. 513 (affirming [D. C. 1910] 184 F. 543), and cases cited therein.

## II

**The Constitutionality of the Summary Procedure Contemplated in Section 1, Paragraph 15, of the Interstate Commerce Act Has Not Been Adjudicated.**

Appellants urge that, if Section 1, paragraph 15, empowers the Commission to order increases in rates or charges without affording opportunity for hearing before the increases become effective, that provision of the Act violates the Due Process Clause. Appellants' contention was alleged in its petition for injunction and was vigorously pressed upon the court below. Unaccountably, under these circumstances, the court below ignored the entire question; its opinion does not even mention the point.

This question, we submit, is basic. In term after term of this Court it has received the Court's attention in one form or another, and in no instance has this Court ruled that an administrative agency may be empowered to fix rates or charges without affording interested persons an opportunity to be heard before the rates or charges become effective. At least three times during the last ten years and once within the last year, this Court has expressed itself as follows:

> The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final order becomes effective.* (Emphasis supplied.) *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152, 153, 61 S. Ct. 524, 536, 85 L. Ed. 624; *United States* v. *Ill. Central R. Co.*, 291 U. S. 457, 463, 54 S. Ct. 471, 473; *Inland Empire Dist. Council, Etc.* v. *Millis*, 325 U. S. 697, 710, 65 S. Ct. 1316, 1323, decided June 11, 1945.

Appellants are mindful that, in *Bowles* v. *Willingham*, 321 U. S. 503, 519, 521, 64 S. Ct. 641, 649, 650, this Court

held that the Administrator of the Office of Price Administration under a wartime statute could fix rents without the necessity of hearing at the administrative level. It might be argued that the rationale of this decision is, to some extent, inconsistent with that of the cases previously cited. It is only necessary to say that, if there be this inconsistency, it serves here only to demonstrate the substantiality of the question now presented.[3] On the other hand, if the excerpt quoted above from the *Opp Cotton Mills* case is still the law of this Court as far as rate making procedure is concerned, the judgment of the court below becomes even more imperatively the concern of this Court.

The court below, in completely ignoring the constitutional issue in the case, undoubtedly makes more difficult the appellants' task in securing the ear of this Court on that issue. Appellees have seized on this temporary advantage and, in their motion to affirm, endeavor further to distract this Court's attention by the following single-sentence reference to the question:

> Other points urged by appellants require no consideration. The allegations of unconstitutionality advanced by appellants amount merely to a restatement in different form of their claim that the Commission acted without statutory authority. *Baltimore & Ohio Railroad Co.* v. *United States*, 305 U. S. 507, 526.

An examination of this sole decision cited by appellees serves only to corroborate the shallowness of appellees' effort to avoid judicial scrutiny of the constitutional question presented here. In the *Baltimore & Ohio Case*, it was claimed that a cease-and-desist order of the Commission was a violation of substantive due process. The reasonableness of the order was the sole question involved. No procedural rights were even alleged to have been invaded.

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[3] Note 1, *supra*, p. 1.

In the case at hand, the reasonableness of the Commission's orders is not in issue; the matter here presented is the power of Congress to sanction the issuance of any order at all in the manner in which the orders were issued. The lack of analogy of a case dealing with substantive power to the problem of procedural due process here presented is apparent.

Respectfully submitted,

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